NO. 90-84

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDUCATION ASSISTANCE CORPORATION,
a South Dakota corporation,

Petitioner,

v.

LAURO F. CAVAZOS,
Secretary of Education of the United States

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF AMICI CURIAE OF THE STATES OF SOUTH DAKOTA, COLORADO, ILLINOIS, MISSOURI, MONTANA, NEW MEXICO, NEVADA, NORTH DAKOTA, OKLAHOMA SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT, AND WYOMING; THE COMMONWEALTH OF VIRGINIA; AND THE TERRITORY OF AMERICAN SAMOA IN SUPPORT OF PETITION

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The Attorneys General of the States of South Dakota, Colorado, Illinois, Missouri, Montana, New Mexico, Nevada, North Dakota, Oklahoma, South Carolina, Tennessee, Utah, Vermont, and Wyoming; the Commonwealth of Virginia; and the Territory of American Samoa submit this brief amici curiae, pursuant to the Rules of this Court, Rule 37.5, in support of the petition for a writ of

certiorari filed by Education Assistance Corporation, urging this Court to grant review of and ultimately reverse the judgment of the United States Court of Appeals for the Eighth Circuit in Education Assistance Corp. v. Cavazos, 902 F.2d 617 (1990).[1]

INTEREST OF AMICI CURIAE

The State of South Dakota, although it has no ownership interest in the petitioner,

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[1]The congressional action mandating seizure of guaranty agency reserves in this case, the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, Title III, Subtitle A, 101 Stat. 1330, 1330-36 to 1330-38, has resulted in over twenty cases throughout the country, most of which are still pending in the lower federal courts. Besides this case, the pending petitions in Nos. 89-1873, 89-2027, 90-4, and 90-13 raise similar issues in seeking review of decisions of two other courts of appeals that have recently come to the same conclusion as the Eighth Circuit. South Carolina State Education Assistance Authority v. Cavazos, 897 F.2d 1272 (4th Cir. 1990); Ohio Student Loan Commission v. Cavazos, 900 F.2d 894 (6th Cir. 1990). These amici support those petitions as well.

Education Assistance Corporation ("EAC"), has an obvious interest in its continued financial viability, which is threatened by the federal government's seizure of its reserves. First, EAC was organized in 1978 as a private, South Dakota nonprofit corporation, for the express purpose of being the guaranty agency for South Dakota under the Higher Education Act of 1965, as amended ("the Act"). EAC undertook, by a contract with the South Dakota Education and Cultural Affairs Planning Commission, and pursuant to the Governor's designation, to operate a guaranteed student loan program within the State. EAC committed itself to assure 100% access by South Dakota students to guaranteed student loans.

EAC has carried out its commitment to South Dakota, working with lenders and institutions of higher education in the State (and in neighboring states) to make its

program successful. As a result, South Dakota students and their parents have had ready access to loans for post-secondary education. EAC's program has been highly effective and has one of the lowest default rates in the nation. If EAC were to fail because of Congress's seizure of its assets, South Dakota would be left without a guaranty agency whose primary focus is seeing that the benefits of the Guaranteed Student Loan ("GSL") Program are made available to the students of South Dakota and their parents.

Secondly, 232 lenders in South Dakota have made student loans in reliance on EAC's guaranties, over $344 million in original disbursement amount of which is still outstanding. Should the seizure of EAC's reserves leave it incapable of performing on those guaranties, the lenders would have no recourse against the Secretary of Education

or otherwise against the federal government.[2] The adverse impact of an EAC failure on those

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[2]In recent congressional testimony relating to the current financial problems facing the nation's largest guaranty agency, Higher Education Assistance Foundation (HEAF), the United States General Accounting Office described the risk to the federal government of that agency's failure:

> If HEAF should fail and is unable to meet its commitments to pay lenders for defaulted guaranteed loans, the question becomes: is the payment of lenders' default claims a responsibility of the federal government? Under the Higher Education Act, as amended, the Department of Education has no direct legal obligation to lenders if a guaranty agency, such as HEAF, becomes insolvent or otherwise fails to meet its obligations. The contract the Department entered into with the guaranty agency does not extend to the lender--the Department is not insuring lenders. Therefore, the Department has no legal responsibility to pay lenders claims if HEAF should fail.

Financial Problems in the Stafford Student Loan Program: Hearings Before the Committee on Banking, Housing and Urban Affairs, 101st Cong., 2d Sess. 14-15 (Friday, July 27, 1990) (statement of Franklin Frazier, Director, Education and Employment Issues, Human Resources Division, United States General Accounting Office).

lenders, and particularly on Student Loan Finance Corporation, the nonprofit organization created to make a secondary market in South Dakota student loans, would be substantial.

Besides its direct effect on the lenders and the secondary market, such a failure could be expected to make local lenders leery of ever making GSL Program loans again and could thereby dry up the availability of those loans to South Dakota students and their parents.

Concern about the possible failure of student loan guaranty agencies is not farfetched. Recent disclosures concerning the deteriorating financial condition of HEAF,[3] emphasize guaranty agencies' need for

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[3] See, e.g., "No Guarantees: How HEAF Faltered in Student-Loan Role," Barron's, (Footnote Continued)

adequate reserves to withstand such events as the reduction in the size of federal reimbursement that occurs when an agency's default rate exceeds a particular level. Significantly, that agency, which the Secretary himself acknowledges is on the brink of failure, was one of the agencies deemed by Congress to have "excess" reserves, which the Secretary seized under the Omnibus Budget Reconciliation Act of 1987, the same authority under which EAC's reserves were declared excessive and seized. These events support the record made by EAC in this case[4]

(Footnote Continued)
p. 16 (July 30, 1990); Department of Education News (July 24, 1990) ("Statement by Secretary Cavazos: Department of Education Task Force Now at HEAF"); "Chief Guarantor in Student-Aid Program Faces Financial Collapse, Seeks Merger," The Wall Street Journal, p. A3 (July 23, 1990).

[4]See District Court's findings of EAC's "largely uncontroverted" showing on the
(Footnote Continued)

showing that the statutory declaration that the reserves were not needed--the logical underpinning for their confiscation--was simply wrong.[5]

The interests of the other amici are similar to those of South Dakota. In Colorado, Illinois, Missouri, Montana, North Dakota, Oklahoma, South Carolina, Utah, and Vermont, the guaranty agencies are state agencies. The New Mexico and Tennessee guaranty agencies are private nonprofit corporations, as is the case in South Dakota. The Tennessee Student Assistance Corporation

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(Footnote Continued)
expected adverse impact of the seizure on its operations. Pet. App. at 37a-38a.

[5]In light of these events, it is astounding that the government could say in its Brief for Respondents in Opposition in Maryland Higher Education Loan Corporation v. Cavazos, Nos. 89-1873, 89-2027 and 90-4 at 5, that "A major problem with the GSLP has been the increasing accumulation and use of cash in the guaranty agencies' reserve funds."

(TSAC) serves many of the same functions in Tennessee as EAC in South Dakota. In addition, it is required by Tenn. Code Ann. § 4a-4-401 to maintain a designated reserve fund level to be authorized to guarantee additional student loans. Seizure of "excess" reserves could limit the ability of TSAC to provide guaranteed student loans to Tennessee students and their parents. The Virginia State Education Assistance Authority was created on March 31, 1960, and operated for six years without any assistance from the federal government. Since 1966, the authority has entered into contracts with the federal government. In 1982, it became an independent political subdivision of Virginia. Student loans in Wyoming are guaranteed by several agencies, foundations and corporations, with the largest number being guaranteed by HEAF. See Notes 2 and 3 hereof and accompanying text. United Student

Aid Group, Inc., a private, nonprofit corporation, is the primary guarantor of student loans for Nevada and American Samoa.

Accordingly, the amici curiae have strong and substantial interests in the outcome of this and related pending petitions.

SUMMARY OF ARGUMENT

The federal government may not make a commitment to the States or private entities, exact performance and commitments from the State or the private entity, and then change the rules so as to breach its commitment. Lynch v. United States, 292 U.S. 571 (1934). In this case, the state agencies and private corporations whose reserves have been seized by the Secretary undertook to guaranty loans in the past based on the Secretary's commitment to give them reinsurance and other benefits. The government then breached this obligation by retroactively refusing to

provide the benefits it had guaranteed unless the agencies surrendered most of their reserves. The decision of the Eighth Circuit allowing this breach of government obligation threatens to make all commitments of the federal government unenforceable and meaningless. It also puts the States and private entities at the unchecked mercy of the Congress and federal officials. The amici States therefore urge that the writ be granted and that the decision of the Eighth Circuit be reversed.

ARGUMENT

In the GSL Program, as in many other programs, Congress has seen the wisdom of having policies that it endorses carried out at the local level by private entities and the States. In addition to the GSL Program,

there are a myriad of programs[6] in which Congress has asked the States to undertake such responsibility. In order to do so, the States have bound themselves to tremendous financial obligations, in many cases in reliance on the federal government's promise, by statute, regulation, or contract (or some combination of the three), to reimburse costs or otherwise to stand behind the obligations financially. In this case, the federal government undertook contractually to provide re-insurance and other benefits to EAC and the other private corporations and state agencies that have contracted with the Secretary. EAC and the others, based on this agreement, undertook obligations, in the

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[6]EAC has listed a few of the many programs in which Congress has turned to the private sector to serve a role in carrying out national policy. Petition at 12 n.14.

past, to insure loans and pay them in the event of default. The seized reserves were all accumulated in the past to cover these obligations. The seizure of these assets is thus entirely retroactive and cannot be characterized as a change in future obligations. The federal government induced EAC and others to incur obligations and has now effectively removed the ability to comply with the obligations it induced. If such a retroactive taking is sanctioned, there is no limit to the power of Congress to induce action by a private entity or state, withdraw the inducement, and leave the private entity or state to pay without benefit of the inducement.

To cite only one example, Aid to Families with Dependent Children (AFDC) is administered by the states, but the federal government has undertaken to participate financially with the states, provide funding,

adopt program requirements, and audit and supervise state compliance with federal laws and regulations. See e.g. 45 CFR Part 201, Approval of State Plans and Grants; Part 205.38, Federal Financial Participation in Statewide Mechanized Systems; Part 213, Practice Rules for Hearings on State Conformity, Part 233.33 through 233.145, Program Requirements; Part 234.120, Federal Financial Participation in Programs under Title 4A (AFDC); Part 237.50, Federal Financial Participation Based on Count of Eligible Persons; Part 238.60, Federal Financial Participation (hereinafter FFP) in Community Work Experience Program; Part 239.80, FFP and Work Supplementation Program; Part 240.60, FFP and Employment Search Program, Part 250.20, State Plan Requirements for Job Opportunity and Basic Skills Training Program; Part 250.70 through 250.79, FFP for same program.

The regulations cited provide extensive requirements for state plans and participation. If the state complies, and has an approved plan in these categories or programs, it would be entitled to reimbursement in accordance with the plan. Presumably, the federal government can amend plan requirements. It cannot, however, refuse reimbursement for an already executed state plan. If the state complied with applicable regulations, and carried out its approved plan, the federal government should be required to pay in accordance with its agreement.

This is not to say that the regulations are set in stone, or that plans could not be amended. What the states object to in this case, and would object to in the event that a similar attempt were made in other social welfare programs, is a retroactive increase in state obligations, after the federal

government has induced compliance with its prior regulations. Where, as in the case of EAC, the federal government has promised to provide financial participation with states and private entities (here by promising reinsurance and participation in administrative expenses; elsewhere by promising federal financial participation and reimbursement) in return for compliance with certain regulations, it has made a solemn commitment. It breaches its contract, and repudiates its commitment, when it induces compliance, the bargain is performed by the state, and the federal government changes the rules before it has carried out its side of the bargain.

The decision of the Eighth Circuit (and those which are the subjects of the petitions referred to in n.1, above) put all such commitments by the federal government at risk. Never has this Court sanctioned the

idea that because the federal government makes its promise in the setting of a program that it (inevitably) regulates, it is free to change its mind retroactively and renege on the promise, without compensating the promisee. To the contrary, it has always been the law that:

> Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.

Lynch v. United States, 292 U.S. 571, 579 (1934) (footnote omitted).

Even in Bowen v. Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986), where the Court rejected a state's argument that congressional action in disavowing a contractual provision violated the Fifth Amendment, the Court was careful to affirm the continued validity of Lynch and to emphasize that the provision there in issue

did not constitute "an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium." Id. at 55. The reimbursement commitment undertaken by the Secretary to EAC and other guaranty agencies was precisely such an obligation, and the Eighth Circuit's reading of Bowen to support, rather than denounce, the abrogation of that commitment is deeply disturbing to the amici and all others who rely on various financial undertakings of the federal government to them.

The decision below is profoundly dangerous. That it comes at a time when Congress is looking for ways to cut expenditures drastically only increases its dangerousness. For, as this Court said in Lynch, "[t]o abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an

act of repudiation." 292 U.S. at 580. That constitutional truth is as valid today as it was in 1934 and clearly, as the decision below demonstrates, in need of repetition and reaffirmation here.

CONCLUSION

Amici curiae respectfully request that the Court grant EAC's petition for certiorari and reverse the decision of the Eighth Circuit.

Respectfully submitted,

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